



November 22, 2000

Ms. Linda Henry
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2562

OR2000-4519

Dear Ms. Henry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#141208.

The Port of Houston Authority (the "authority") received a request for personnel files for named current and former employees and time sheets and salary histories for specified periods of time for named current and former employees. You assert that all of the requested information, except current salaries of current employees, is excepted from required public disclosure by sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. You state that you will release the current salaries of current employees in compliance with section 552.022(a)(2) of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.¹

You assert section 552.103 of the Government Code, the "litigation exception." Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

requestor applies to the officer for public information for access to or duplication of the information.

The authority has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that 1) litigation is pending or reasonably anticipated, and 2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The authority must meet both prongs of this test for information to be excepted under 552.103(a).

You advise this office that the authority is currently involved in a lawsuit involving the requestor. You have furnished this office with a copy of a complaint filed in federal district court that names the authority as defendant, therefore establishing that litigation is pending. In addition, you have made the requisite showing that the requested information relates to that litigation. Therefore, except as noted below, the authority may withhold the requested information pursuant to section 552.103.

Section 552.103 does not protect from required disclosure information which is specifically made public by section 552.022 of the Government Code. Section 552.022 sets forth the categories of public information and provides in pertinent part that:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body [.]

The information you have submitted as exhibits F-1 and F-2 contains the names, salaries, titles, and dates of employment of employees of the authority and information relating to the expenditure of public funds by the authority specifically made public under section 552.022(a)(2). We have marked the information that we consider to be the type of information contemplated by section 552.022(a)(2), including the information on the "Record of Change in Status" forms indicating name, title, date employed, starting salary, and changes to title and salary. In addition, we have marked information on the submitted documents which falls under section 552.022(a)(1) as "evaluations" made by a governmental body. These include employee performance reviews and evaluations. The section 552.022(a)(1) and 552.022(a)(2) information must be released if it is not "expressly confidential under other law." Gov't Code §552.022(a). Section 552.103 is a discretionary

exception and is not “other law” that makes information confidential.² Therefore, in summary, the authority must release under section 552.022(a) the information we have marked but may withhold the remainder of the submitted information under section 552.103.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one

²Discretionary exceptions protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

³We note that the submitted information may contain information made confidential by section 552.101, 552.102, or 552.117 of the Government Code. If you receive another request for this information after litigation has concluded, you must seek another decision from this office as to the availability of that information.

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.- Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/seg

Ref: ID# 141208

Encl. Submitted documents

cc: Mr. Stephen Miller
6316 Pickens Street
Houston, Texas 77007
(w/o enclosures)